

Robinson v Bogopa Brentwood, Inc.

2022 NY Slip Op 31557(U)

March 8, 2022

Supreme Court, Suffolk County

Docket Number: Index No. 609575/2018

Judge: Vincent J. Martorana

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Short Form Order

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Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

TAMMY ROBINSON,

Plaintiff,

- against-

BOGOPA BRENTWOOD, INC.,

Defendant.

ORIG. RETURN DATE: 04/30/21
ADJOURNED DATE: 05/27/21
MOTION SEQ. NO.: 001 - MD

PLTF'S/PET'S ATTY:
Borda, Kennedy, Alsen & Gold, LLP
1805 Fifth Avenue, Suite 11
Bay Shore, New York 11706

DEFT'S/RESP'S ATTY:
Bell Law Group, PLLC
116 Jackson Avenue
Syosset, New York 11791

Upon efiled documents numbered 9-18, 20; it is

ORDERED that Defendant's motion seeking summary judgment dismissing Plaintiff's complaint is denied.

The within action seeks damages for personal injuries allegedly sustained by Plaintiff on November 23, 2016 as a result of slipping on cooking oil on the floor of Defendant's "Food Bazaar" supermarket. Issue has been joined, discovery commenced and Defendant now seeks summary judgment dismissing Plaintiff's complaint.

Defendant asserts that it did not create the slippery condition nor did it have actual or constructive notice of it because the oil was dropped on the floor by a customer eight minutes prior to the accident. In support of its motion, Defendant offers an affidavit of Richard Kim ("Kim"), R&M Manager for Defendant. Kim avers that he manages all of Defendant's closed-circuit televisions for surveillance. He states that after an incident or accident occurs, video recordings are preserved and maintained in the regular course of business. Kim certified that the video provided to the court is a true and accurate copy of the recording made at the time of the accident.

The surveillance video provided by Defendant shows that a shopper knocked a large container of cooking oil off the shelf at the recorded time of 13:56:59 and that the cap popped off,

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spilling some of the contents onto the floor. The shopper then replaced the cap, leaving the spilled container upright on the floor near the puddle of oil and walking away. The surveillance video further shows that at 14:05:34, Plaintiff pushed her shopping cart through the oil and her left foot slid slightly, causing her torso to jerk backward. She staggered for a moment before she regained her balance, continuing to push her cart through the oil spill, then turning to look behind her at the floor. Plaintiff's young son was seated in the cart at the time and it does not appear from the video that either he or the cart were jostled by the incident.

Plaintiff testified at deposition that:

"there was oil right there and I didn't see it and I went over it and I slipped and the cart went up and I caught my son before he fell out [of] the cart" (Plaintiff's deposition p. 17).

Plaintiff further testified that when her foot slipped in the oil:

"I slipped and hit my arm" (p. 18). When asked to repeat her answer she stated:
"I slipped and hurt my leg and my arm and back" (p. 18). When asked if her right leg hit anything she stated: "It hit the floor" (p. 18).

Plaintiff continued, stating that she hurt her shoulder trying to catch her son so that he would not fall out of the cart, that the back of the cart went into the air a bit (p19) and that she thinks she twisted her back trying to grab the cart and/or her son (p 20).

In opposition to Defendant's motion, Plaintiff's counsel argues that the amount of time that passed was actually 8 minutes and 35 seconds which could have been sufficient time to clean the spill or close off the area of the spillage. Plaintiff further argues that Defendant has failed to establish that it lacked actual notice of the spill. Plaintiff claims that Defendant must have expert opinion to support an assertion that Plaintiff was not injured. Defendant counters that it is not alleging that Plaintiff was not hurt, it is alleging that her testimony is contradicted by video evidence and that it should be discounted due to lack of credibility.

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (see *O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 52 NYS3d 68 [2017]). The opposing party must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Stonehill Capital Mgmt., LLC v. Bank of the West.*, 28 NY3d 439, 44845 NYS3d 864 [2016])(quoting *Alvarez v Prospect Hosp.*, 68 NY2d at 324, 508 NYS2d 923).

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In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (*S.J. Capelin Associates v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (*Prunty v Keltie's Bum Steer*, 163 AD2d 595, 559 NYS2d 354 [2d Dept. 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (*Prunty v Keltie's Bum Steer, supra*, citing *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93 [1968]; *Columbus Trust Co. v Campolo*, 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *aff'd*, 66 NY2d 701, 496 NYS2d 425; *Barclays Bank of New York, N.A. v. Sokol*, 128 AD2d 492, 512 NYS2d 419, 420 [2d Dept. 1987]).

In order to state a negligence cause of action, a party must assert the existence of a duty, along with a breach of that duty, which proximately caused injury and resulted in damages (*Muallem v. City of New York*, 82 AD2d 420, 441 NYS2d 834 [2d Dept. 1981], *aff'd*, 56 NY2d 866 [1982]; *Pulka v. Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]; *Miglino v. Bally Total Fitness of Greater New York, Inc.*, 92 AD3d 148, 937 NYS2d 63 [2d Dept. 2011], *aff'd but criticized*, 20 NY3d 342 [2013]). An owner or possessor of land has a common law duty to maintain his or her property in a reasonably safe condition in view of all the circumstances, including the frequency of use by others, the likelihood of injury to others, the seriousness of the potential injury, and the burden of avoiding the risk (*Peralta v Henriquez*, 100 NY2d 139, 144, 760 NYS2d 741 [2003]; *Alnashmi v. Certified Analytical Grp., Inc.*, 89 AD3d 10, 14, 929 NYS2d 620, 624 [2d Dept. 2011]; *Gronski v. Cty. of Monroe*, 18 NY3d 374, 940 NYS2d 518 [2011]; *Basso v. Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]; *Alonzo v. City of New York*, 188 AD3d 1123, 134 NYS3d 429 [2d Dept. 2020]). In order to impose liability upon a defendant based upon a dangerous condition, "there must be evidence that the dangerous condition existed, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time" (*Grullon v. W. 48th St. Redevelopment Corp.*, 75 AD3d 621, 622–23, 905 NYS2d 278, 279–80 [2d Dept. 2010]; *see also Melo v. LaGuardia Fitness Ctr. Corp.*, 72 AD3d 761, 898 NYS2d 625 [2d Dept. 2010]; *Barrett v. New York City Transit Auth.*, 176 AD3d 909, 111 NYS3d 615 [2d Dept. 2019], *leave to appeal denied*, 35 NY3d 914 [2020]; *Alonzo, supra*) and that the condition caused Plaintiff's accident, resulting in injury (*Leary v. N. Shore Univ. Hosp.*, 218 AD2d 686, 630 NYS2d 554 [2d Dept. 1995]; *Skay v. Pub. Libr. of Rockville Ctr.*, 238 AD2d 397, 657 NYS2d 553 [2d Dept. 1997]; *Grant v. L & J G Stickley, Inc.*, 20 AD3d 506, 799 NYS2d 123 [2d Dept. 2005]; *Hartman v. Mountain Valley Brew Pub, Inc.*, 301 AD2d 570, 754 NYS2d 31 [2d Dept. 2003]; *Thompson v. Commack Multiplex Cinemas*, 83 AD3d 929, 921 NYS2d 304 [2d Dept. 2011]; *Bombino-Munroe v. Church of St. Bernard*, 163 AD3d 616, 80 NYS3d 429 [2d Dept. 2018]).

Constructive notice of a hazardous condition on property may be imputed when "...the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it" (*Wittman v. Nespola*, 190 AD3d 1012, 1012–13, 136 NYS3d 885, 886 [2d Dept. 2021]; *Gordon v. Am. Museum of Nat. Hist.*, 67 NY2d 836, 501 NYS2d 646 [1986]; *Melo, supra*; *Abrams v. Berelson*, 94 AD3d 782, 942 NYS2d 132 [2d Dept. 2012]; *Kyte v. Mid Hudson Wendico, Inc.*, 131 AD3d 452, 15 NYS3d 147 [2d Dept. 2015]; *Seung Chul Na v. JP Morgan Chase & Co.*, 123 AD3d 903, 1 NYS3d 125 [2d Dept. 2014]) (no constructive notice where rain water had been mopped up 30 minutes prior and other

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customers entered without incident); *Radosta v. Schechter*, 171 AD3d 1112, 97 NYS3d 664 [2d Dept. 2019](no constructive notice where rainwater had been dry mopped 15-25 minutes prior); *Yacovelli v. Pathmark Stores, Inc.*, 67 AD3d 1002, 888 NYS2d 750 [2d Dept. 2009](no constructive notice where inspection was 3 minutes prior and steady stream of pedestrian traffic went through area)).

A defendant seeking summary judgment in a slip or trip and fall case (or a slip only case, as alleged here) must make a prima facie showing that it did not create the hazardous condition at issue and that it “did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it” (*Barron v. E. Athletic, Inc.*, 150 AD3d 654, 655, 53 NYS3d 689, 690 [2d Dept. 2017]; *Skerrett v. LIC Site B2 Owner, LLC*, 199 AD3d 956, 158 NYS3d 186 [2d Dept. 2021]; *Deutsch v. Green Hills (USA), LLC*, No. 2019-07166, 2022 WL 468384, at *1 [2d Dept. 2022]). Generally, to meet its burden with respect to lack of constructive notice, a defendant must offer evidence as to when the area was last cleaned or inspected, relative to the time when the plaintiff fell (*Skerrett v. LIC Site B2 Owner, LLC, supra*; *Williams v. Island Trees Union Free Sch. Dist.*, 177 AD3d 936, 114 NYS3d 118 [2d Dept. 2019]; *Marazita v. City of New York*, No. 16846/14, 2022 WL 468409, at *2 [2d Dept. 2022]). Alternately, a defendant may establish its entitlement to judgment as a matter of law by demonstrating that the plaintiff cannot identify the cause of his or her fall because in such case proximate cause is based upon speculation (*Deutsch v. Green Hills (USA), LLC, supra*; *Marazita v. City of New York, supra*). However, here it is uncontroverted that the cause of plaintiff’s slipping was a cooking oil spill caused by another customer and that fewer than nine minutes passed between the unidentified customer having spilled the oil and the plaintiff having slipped on it.

As discussed above, the court must consider causation, injury and notice. There is no dispute that the cause of Plaintiff’s slipping was the oil on the floor (although the character and extent of the slipping incident is disputed) and Defendant has failed to establish that there was no injury. Notice is the critical element at this juncture. It is the finding of this court that insufficient time passed between the spill of the oil and Plaintiff’s encounter with it to permit Defendant to discover the spill and remedy it. Defendant has met its burden as to lack of constructive notice. However, nowhere in Defendant’s moving papers is any evidence that Defendant did not have actual notice of the slippery condition. Therefore, as Defendant has failed to make a prima facie case that it lacked actual notice, Defendant’s summary judgment motion is denied.

The parties are directed to enter into a stipulation scheduling remaining discovery or, if discovery is complete, to execute a certification conference stipulation and submit it to the court via NYSCEF in advance of the next scheduled conference date.

Dated: March 8, 2022
 Riverhead, New York



 VINCENT J. MARTORANA, J.S.C.

CHECK ONE: FINAL DISPOSITION NON-FINAL DISPOSITION